UPREME COURT, U. S.

OCT 6 1969

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 562

LEONARD DE LUE, D. J. SEBERN, T. W. RINKER, and TED P. RINKER, d/b/a ARMORED MOTORS SERVICE; and THE CONTRACT CARRIERS CONFERENCE OF THE COLORADO MOTOR CARRIERS ASSOCIATION, **Petitioners,**

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; JOHN JOSEPH PERRY and PAUL K. DI ANDREA, d/b/a PERRY TRANSFER COMPANY; and B.D.C. CORPORATION OF COLORADO, **Respondents.**

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF OF RESPONDENT, THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, IN OPPOSITION

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INDEX

PAGE

JURISDICTION 1

QUESTION PRESENTED 3

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 4

STATEMENT OF THE CASE 4

ARGUMENT 4

CONCLUSION 15

TABLE OF CASES CITED

Aero Mayflower Transit Co. v. Board of R.R. Com'rs of the State of Montana, 332 U.S. 495 (1947) 3

Alabama Power Co. v. Ickes, 302 U.S. 464 (1938) 13

Allegheny Corporation v. Breswick & Co., 353 U.S. 151 (1957) 7

Dewey v. City of Des Moines, Iowa, 173 U.S. 193, 197, 198 (1899) 3

Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143 (1923) 8

Guaranty Trust Co. v. Blodgett, 287 U.S. 509 (1932) 3

Keokuk & H. Bridge Co. v. Illinois, 175 U.S. 626, 633-635 (1900) 3

M. W. Smith Lumber Co. v. Alabama Public Service Commission, 247 Ala. 318 (1946) 8

McKay v. Public Utilities Commission, 104 Colo. 402 (1939) 9, 11

PAGE

Moffat Tunnel League v. United States, 289 U.S. 113, 119 7

Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).... 13, 14

Poyner v. Whiddon, 234 Ala. 168, 174 So. 507, 510..... 8

Price v. Illinois, 238 U.S. 466 (1915)..... 1, 2

Public Utilities Commission v. Stanton Transportation Co., 153 Colo. 372 (1963)..... 10

Quong Ham Wah Co. v. Industrial ACC. Commission of California, 255 U.S. 445, 448 (1921)..... 2

Radford Iron Co. v. Appalachian Electric Power Co., 62 F.2d 940 (1933)..... 9

San Miguel Power Association v. Public Service Commission, 4 Utah 2d 252 (1956)..... 12

Tampa Waterworks Co. v. Tampa, 199 U.S. 241 (1905) 2

Tennessee Power Co. v. TVA, 306 U.S. 118 (1939)..... 13

Thornton v. Duffy, 254 U.S. 361 (1920)..... 3

Wilson v. Cook, 327 U.S. 474, 483 (1946)..... 3

OTHER AUTHORITIES

C.R.S. 1963, 115-6-9 (1)..... 6

28 U.S.C. 1257(3)..... 1

Amendment XIV, Section 1, United States Constitution 6

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OPINION BELOW

Set forth verbatim as Appendix A-3 to the Petition.

Jurisdiction

Petitioners state jurisdiction is conferred by 28 U.S.C., Section 1257(3), which Respondent challenges.

28 U.S.C. 1257(3) requires, as here pertinent, that the validity of state statute as being repugnant to the Federal Constitution must be drawn into question in the court below.

The question raised below is set forth in the Petition for Rehearing by (Petitioner) The Contract Carriers Conference before the Supreme Court of the State of Colorado (R. p. 67) as follows:

> 1. ... As was pointed out throughout the Briefs of Plaintiffs in Error, the right to appear is not only recognized by the Rules of Practice and Procedure of the Public Utilities Commission, but also by the Public Utilities Law of the State of Colorado, and is *guaranteed by* the due process clauses of the State and Federal Constitutions. For this issue concerning the right to appear to be termed "collateral and immaterial" the Court would have had to have overlooked or misapprehended the provisions of these Rules, Laws, and Constitutions. (Emphasis is not supplied.)

This is simply a question of statutory interpretation to determine whether a person engaged in private carriage may intervene *as a matter of right* in a proceeding before the Commission involving the transfer of a common carrier certificate.

The Supreme Court of Colorado answered this question in the negative basing its determination upon a thorough examination of the pertinent statute and specific application to the situation and position of Petitioners.

It is a well settled rule that this Court not only accepts, but is bound by the construction given state statutes by state courts and that such construction is not subject to review, even though the effect of such construction is to remove any repugnancy to the Federal Constitution. See, among others, *Quong Ham Wah Co. v. Industrial ACC. Commission of California*, 255 U.S. 445, 448 (1921); *Tampa Waterworks Co. v. Tampa*, 199 U.S. 241 (1905); *Price v.*

Illinois, 238 U.S. 446 (1915); *Aero Mayflower Transit Co. v. Board of R.R. Com'rs of State of Montana,* 332 U.S. 495 (1947); *Thornton v. Duffy,* 254 U.S. 361 (1920); and *Guaranty Trust Co. v. Blodgett,* 287 U.S. 509 (1932).

Petitioners now present an entirely new federal question for review by this Court, i.e.,

> "Can the Public Utilities Commission of the State of Colorado constitutionally deny motor vehicle carriers holding valid private (contract) carrier permits from the State of Colorado the right to appear and be heard with respect to the transfer of a common carrier certificate, which certificate directly conflicts with the authority held by such private carriers, where they would be affected by such transfer" (Petition, p. 3).

A party who has raised but one federal question in the state court cannot in the United States Supreme Court argue, in addition thereto, another not raised in the courts below. *Dewey v. City of Des Moines, Iowa,* 173 U.S. 193, 197, 198 (1899); *Keokuk & H. Bridge Co. v. Illinois,* 175 U.S. 626, 633-635 (1900); and *Wilson v. Cook,* 327 U.S. 474, 483 (1946).

From the foregoing, it is clear that Petitioners have failed to sustain their burden of showing that this Court has jurisdiction to review the question presented for review here. It is, therefore, respectfully requested that this Honorable Court dismiss this Petition for Writ of Certiorari on the basis of a lack of jurisdiction.

QUESTION PRESENTED

Whether the Petitioners have been deprived of their property without due process of law and denied equal pro-

tection of the laws by the Public Utilities Commission of the State of Colorado in denying their requests for intervention as a matter of right and by entitlement as a matter of law in a proceeding involving the transfer of motor common carrier operating rights.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are listed in the Petition.

STATEMENT OF CASE

The statement of the case presented by Petitioners in their Petition is substantially correct and will be adopted here as the statement of the chronological procedure of this action.

Respondent, The Public Utilities Commission of the State of Colorado (hereinafter referred to as "Commission"), will merely add a brief synopsis of the case as a supplement.

Perry Transfer Company filed an application with the Commission to transfer its motor vehicle common carrier certificate No. 3800 (& I) to B. D. C. Corporation of Colorado. The transfer contemplated and included only the exercise of common carriage under the terms of the certificate owned by the transferor, Perry. Petitioner, Armored Motors Service, a motor vehicle *contract* carrier holding no common carrier authority and Petitioner, The Contract Carriers Conference of the Colorado Motor Carriers Association holding neither contract nor common carrier operating authority attempted to intervene as

Protestants to the transfer. It should be noted that the aforesaid Conference was not a legal entity, but rather only a part of a non-profit Colorado corporation which did not appear as a party in the proceeding (R. p. 146).

In relating what they consider to be the question presented for review, Petitioners demonstrate the untenability of their position by necessarily relying on a boot-strap type of reasoning in order to show they have any basis at all for relief. At page 3 of the Petition, the question is presented as follows:

> "Can the Public Utilities Commission of the State of Colorado constitutionally deny motor vehicle carriers holding valid private (contract) carrier permits from the State of Colorado the right to appear and to be heard with respect to the transfer of a common carrier certificate, *which certificate directly conflicts with the authority held by such private carriers, where they would be affected by such transfer.*" (Emphasis supplied.)

Legal affect upon the private carriers in such proceeding is precisely what the case is all about and the Commission's finding in that regard is the basis for and underlies the ruling which Petitioners here contest.

ARGUMENT

If this Court should determine that it has jurisdiction to review the question presented, it is clear that the question so presented does not involve any special, important or unsettled issues that warrant review by this Court.

In seeking review of the action of the Colorado Supreme Court and the Colorado Public Utilities Commission

in refusing them the opportunity to participate in a particular proceeding, Petitioners allege that such action deprived them of property without due process of law and further deprived them of the equal protection of the law. (Petition, p. 11.)

Thus, in very broad terms they allege that they have been deprived of their rights as protected by Amendment XIV, Section 1, of the United States Constitution (Petition, p. 3). In so arguing their 14th Amendment rights they have completely neglected to set out in any detail or with any specificity how the action of the Colorado Court and Commission denies Petitioners of due process, be it procedural or substantive, nor do they set forth how and on what legal basis they are affected.

The Commission correctly concluded that neither a private carrier by motor vehicle nor an association of private carriers may intervene as a matter of right in applications before the Commission seeking to transfer (common) motor vehicle carrier operating rights.

The Commission held that the intervention of a private carrier as well as an association of private carriers in an application proceeding involving the transfer of common carrier operating rights is a matter of discretion and not of right (R. p. 246). Petitioners on the other hand argued that such intervention is not discretionary, but is a matter of right arising from the status of private carriers in Colorado.

The applicable statute providing for intervention in Commission hearings is 1963 CRS 115-6-9 (1), which reads in part as follows:

"At the time fixed for any hearing before the Com-

> mission, ... the applicant, petitioner, complainant, the person, firm, or corporation complained of, such person, firms, or corporations as the Commission may allow to intervene, and such persons as will be interested in or affected by any order that may be made by the Commission in such proceeding, shall be entitled to to be heard, examine and cross-examine the witnesses, and introduce evidence."

The statute clearly requires that intervenors of right be "interested in or affected by" any order that may be made by the Commission in such proceedings. The meaning of such statutory language in terms of the nature and extent of interest required has been the subject of numerous court interpretations including *Allegheny Corporation vs. Breswick and Co.*, 353 U.S. 151 (1957), wherein the United States Supreme Court had before it a question as to whether certain parties were entitled to an evidentiary hearing before the Interstate Commerce Commission under a statute which provided "and shall afford reasonable opportunity before interested parties to be heard." The Court held:

> "The reference in section 5 to 'interested parties,' like the reference in section 1 (20) to 'party in interest,' must be interpreted in accordance with the rules relevant to standing to become parties in proceedings under the Interstate Commerce Act. A hearing under that Act is not like a legislative hearing and 'interest' is not equivalent to 'concern.' It may not always be easy to apply in particular cases the usual formulation of the general principle governing such standings — e.g., 'the complaint must show that plaintiff has, or represents others having a legal right of interest that will be injuriously affected by the order.' *Moffat Tunnel League vs. United States*, 289 U.S. 113, 119. (353 U.S. at 173)"

In *M. W. Smith Lumber Co. vs. Alabama Public Service Commission,* 247 Ala. 318, 24 So. 2d 409 (1946), a statute similar to Colorado's provided:

> "Every person, firm, corporation, co-partnership, association, or organization affected thereby may by petition intervene and become a party to any proceeding before the Commission."

Under such statute, a commercial user of electricity was denied intervention in a proceeding before the Alabama Public Service Commission involving the reduction of a power company's charges to residential and street lighting customers. Equating the standing necessary to intervene in a commission proceeding with the standing required to appeal as recognized by most cases, the Supreme Court of Alabama upheld the denial of intervention and stated:

> "The words in the above-cited statute 'affected thereby' are pertinent to the question here under consideration. This statute is but the expression of the general rule as expressed in numerous decisions. Illustrative is the following from *Poyner vs. Whiddon,* 234 Ala. 168, 174 So. 507, 510; 'to entitle a party to invoke the court's jurisdiction to review the action of a subordinate court or body, by the writ of certiorari, he must show that he is a party to the proceeding or "that he has a personal interest in the subject matter, and not a mere public interest in common with the general public."' " (24 So. 2d at 411)

In determining what was a sufficient interest, the Alabama Court cited the general principles set forth in *Edward Hines Yellow Pine Trustees vs. United States,* 263 U.S. 143 (1923), as follows:

> "1. To maintain a suit to set aside an order of the

> Interstate Commerce Commission upon the ground that it exceeded the powers of the Commission, it is not essential that a plaintiff should have been a party to the proceedings before the Commission in which the order was made.
>
> "2. But to maintain such a suit, the plaintiff must show that the order alleged to be void subjects to him to actual or threatened legal injury." (24 So. 2d at 411)

With respect to the interest necessary to intervene as a matter of right, the Circuit Court of Appeals for the Fourth Circuit in *Radford Iron Co. vs. Appalachian Electric Power Co.*, 62 F. 2d 940 (1933), stated:

> "It is well settled that the only interest which will entitle a person to the right of intervention in a case is a legal interest as distinguished from interest of a general and indefinite character which do not give rise to definite legal rights."

It is clear from the authorities herein cited that the phraseology "interested in or affected by" contemplates a personal legal interest or right entitled to protection. Applying this to the issue now before this Court, it is necessary to examine the nature and status of private carriers in Colorado and the rights accorded them under Colorado Law.

Before 1931, only common carriers were regulated in Colorado. In that year legislation was enacted authorizing the regulation of private carriers. That and subsequent legislation treating private carriers was the subject of extensive review by the Supreme Court of Colorado in *McKay vs. Public Utilities Commission*, 104 Colo. 402, 91 P. 2d 965 (1939), wherein that Court concluded:

"The legislative intent is clear, that the authorization of private carriers shall not be detrimental, within the limits of the law, to common carrier operation. No permit as a private carrier can be granted by the Commission if in its opinion, based upon proper evidence, such private-carrier operation impairs the efficient public service of an authorized common carrier serving the same territory over the same highways or routes. All this indicates an intent to coordinate motor transportation in such a way as to preserve common-carrier operation and not to impair the integrity of state regulation of common-carrier service (104 Colo. at 413, 91 P. 2d at 970)."

Later in *Public Utilities Commission vs. Stanton Transportation Co.*, 153 Colo. 372, 386 P. 2d 590 (1963), the Colorado Court made the following statement concerning private carrier regulation:

"The flavor of the entire Act is to protect common carrier operations. (153 Colo. at 377, 386 P. 2d at 593) The legislature has expressly declared that the business of private carriers by motor vehicle is affected with a public interest, CRS 1953, 115-11-3. Private carriers are, therefore, public utilities by legislative mandate. *Their property is devoted to a public use to the extent that it cannot be used to engage in competition with common carriers in such a manner as would impair the efficient service of the latter.*" (153 Colo. at 378, 386 P. 2d at 594)" (Emphasis supplied)

Clearly then private carriers are regulated in Colorado for the purpose of protecting common carriers. Sound public policy underlies this protection since the common carrier is the only type of carrier legally obligated to pro-

vide adequate service at reasonable rates to the public. As was explained in the *McKay* case, *supra*:

> "That this is in the public interest cannot be questioned, especially when we have in mind the difference in legal obligations as applied to common carriers and private carriers. The obligations of a common carrier to the public are different. A common carrier has the duty of giving adequate and sustained public service at reasonable rates, without discrimination. Any failure in that respect makes it civilly liable. Liability as to loss and damage owing to negligence is of a higher degree than that of a private carrier. A private carrier is liable for mere negligence. A common carrier is held to the highest degree of care. The purpose of the legislative intent to protect the integrity of regulatory power over common carriers is therefore apparent. The exercise of regulatory power is primarily in the public interest. A greater degree of service is required of the common carrier. Hence, the legislative direction that no permit to a private carrier should be granted if it impairs the efficient public service of an authorized common carrier." (104 Colo. 413, 91 P. 2d 970-971)

As distinguished from the common carrier, the private carrier provides service at its convenience and subject to negotiation of satisfactory agreements with members of the shipping public. This was discussed by the Colorado Court in the *McKay* case, *supra,* as follows:

> "... a private carrier is one who, without making it a vocation, or holding himself out to the public as ready to act for all who desire his services, undertakes, by special agreement in a particular instance only, to transport property from one place to another either

gratuitously or for hire. He carries only for persons with whom he has an initial contract and assumes no obligation to carry for others." (104 Colo. 415-416, 91 P. 2d 971-972)

Petitioners by the very nature of their status as private carriers have chosen to avoid any obligation to serve the public and the intervention of one who avoids the obligation to serve the public is discretionary with the Commission and not a matter of right. A case in point is *San Miguel Power Association vs. Public Service Commission*, 4 Utah 2d 252, 292 P.2d 511 (1956). In that case an electric cooperative filed a complaint and protest to an application for a certificate of convenience and necessity, seeking authority to extend power lines into an area served by the cooperative. The applicant moved to strike the complaint and protest and the Utah Commission granted this motion and refused to allow the cooperative to intervene in the hearing, present evidence, or cross examine witnesses. The cooperative appealed to the Supreme Court of Utah arguing that it had a right to intervene in the hearing. Under Utah Law, a public utility is one which performs service for the public generally, the same as a common carrier in Colorado. The cooperative on the other hand was not required to serve the public generally, thereby making its operation similar to that of a private carrier in Colorado. Affirming the Utah Commission, the Supreme Court of Utah held:

> "Since plaintiffs cannot legally be required to serve the public generally, they are not public utilities and the Commission correctly so decided.
>
> "From what we have said, we do not wish to infer that the Commission may arbitrarily and capriciously refuse to acquaint itself with all facts necessary to

make a decision. Whether the public convenience requires the granting of a certificate of convenience and necessity to an applicant and whether it would be an uneconomical duplication of facilities to render such services.

"In this case, it appears the Commission was fully conversant with the pertinent facts. *Whether plaintiffs should have been allowed the right of cross-examination was within the discretion of the Commission.* Had the Commission desired such aid from plaintiffs it could have allowed them to present evidence and to cross-examine witnesses, but since plaintiffs are not public utilities, the Commission was not required to allow them to intervene." (292 P. 2d at 512) (Emphasis supplied.)

The fact that the Commission must acquaint itself with all existing services does not require that all such services have the right to intervene and to present evidence and cross examine witnesses. The Commission must have sufficient discretionary powers to prevent its proceeding from becoming encumbered.

There is at least an intimation in the Petition that the operations of Petitioners as private carriers are competitive with that of common carriers in Colorado. Whether or not they are is not determinative and has no bearing on the issue of their standing before the Commission. The United States Supreme Court has repeatedly held that in the absence of statutory provisions reflecting a legislative purpose to protect the competitive interest, economic injury which results from lawful competition cannot in and of itself confer standing on the injured business. See *Alabama Power Co. vs. Ickes,* 302 US 464 (1938); *Tennessee Power Co. vs. TVA,* 306 U.S. 118 (1939); and *Perkins vs.*

Lukens Steel Co., 310 U.S. 113 (1940). As pointed out earlier, the private carrier in Colorado possesses no statutory right to protection from competition.

In summary, since under Colorado Law, private carriers are not entitled to protection from competition, their intervention in Commission proceedings is discretionary and not a matter of right. Accordingly, the Colorado Supreme Court and the Commission correctly concluded that neither a private carrier by motor vehicle nor an association of private carriers may intervene as a matter of right in an application before the Commission seeking authority to transfer (common) motor vehicle carrier operating rights.

Petitioners have not shown any legal interest or right which they can assert in a proceeding involving the transfer of a common carrier certificate. Neither have they shown how they would be legally affected by such proceeding. Petitioners have, therefore, completely failed to present a meritorious and substantial federal question that warrants review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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